

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 88 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP MUTUA MAKENZIE.....ACCUSED

RULING

Philip Mutua Makenzie, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 18th day of April, 2015 at Kayole junction along Kangundo Road in Kayole Estate within Nairobi County he murdered Henry Kyalo Wambua. The prosecution has closed its case after calling evidence of sixteen (16) witnesses. It is the duty of the court after the close of the prosecution case to consider the evidence so far adduced and determine whether it establishes a prima facie case against the accused. It is has, the accused will be placed on his defence. If it has not, the accused will be acquitted. These are the requirements of Section 306 of the Criminal Procedure Code.

A prima facie case is simply defined as a case on which a court directing itself to the evidence and the law could convict the accused person if no explanation is offered by the defence. To my mind the case made out by the prosecution at this stage must be one backed by sufficient evidence that the court can rely on to convict an accused person. Criminal law places the burden of proving a case on the prosecution. Proof must be beyond reasonable doubt. Even in instances where the accused takes the option of remaining silent, this cannot be taken against him. He has no duty to prove anything. Unless he decides to admit the offence, the case for the prosecution is as good as done once the prosecution concludes its case. I will summarize the evidence so far adduced before determining whether it establishes a prima facie case.

Ishmael Ongoro (PW1) is a clinical officer running a clinic known as Family Nursing Home and Maternity. It is located on Kangundo Road in Saika. He received the deceased and treated him on 18th April 2015 at 8.00pm. The deceased had deep cut wounds on his head. He was bleeding profusely. PW1 stopped the bleeding, stitched the wounds which he described as deep and administered intravenous fluids and injectable antibiotics. He also gave him pain killers. Due to the seriousness of the head injuries, PW1 referred the deceased to Mathare Teaching and Referral Hospital for a head scan. This was done and the deceased returned to PW1's clinic. PW1 did not treat him again but referred him to Kenyatta National Hospital.

James Kaliku, PW2, was informed of a fight between three people on the date in issue. Time was 7.30pm. He told the court that he went to the scene and was able to identify the accused that was known to him. He was not able to identify the other people. Enock Katiku, PW3, is brother in law to the deceased. His role was to identify the body of the deceased at the mortuary for post mortem purposes. Rachael Kangere Asimangu, PW4, operated a Beauty Shop at Junction Kayole. On the date in issue at around 6.30pm he heard noise from a neighbouring pub. The noise went on for some time. When she looked out of the window she saw the deceased lying down. She did not see who had assaulted him.

Mary Ruguru Kihangu, PW5, was going to the shop on 18th April 2015 at 8.00pm when she the deceased having been assaulted with injuries on the head. Mary knew the family. She went to inform the mother of the deceased Christine Mutanu, PW6. She did not see who had assaulted the deceased. PW6 went to the scene and confirmed her son had been assaulted and sustained injuries on the head. She was assisted to take the deceased to Family Nursing Home. The father of the deceased, Eliud Mwangangi, PW7, was not

at the scene either. He learned of the assault. He testified that he took his son to Kenyatta National Hospital where he was admitted. The deceased stayed in hospital for three (3) months before he died on 25th July 2015. PW7 also followed up the matter with the police.

Tabitha Nyamai, PW8, was girlfriend to the deceased. She was with him on 18th April 2015 but they parted ways around 6.30pm. She learned of his assault. She went to the Family Nursing Home and found the deceased injured on the head. The remaining civilian witness is John Mwema Malemba, PW12. He also testified to receiving news from a bar attendant called Catherine about the assault of the deceased at 7.00pm on 18th April 2015. According to PW12 Catherine told him that the deceased had been hit with a spade. PW12 went to the Pub the scene of the assault and found that the deceased had been taken to hospital. Word went round that one Opiyo had assaulted the deceased. PW12 identified the accused as the person he referred to as Opiyo. He told the court that after the accused was arrested he was called to identify him at Obama Police Post.

The remaining witnesses are police officers and the doctors. Elphas Kipngetich Murei, PW9, told the court that an assault case was reported at Kayole Police Station and he was assigned to investigate. He visited Kenyatta National Hospital on 30th May 2015 but was unable to interview the deceased because he could not talk. He said that on 20th June he went to Junction and met Mwema (PW12) who told him that the deceased had fought with suspect who picked a spade and hit the deceased. He denied conducting an identification parade.

Senior Sergeant Mwaka, PW10, took photographs of the deceased at the Kenyatta Hospital Mortuary. He produced the photos as exhibits 3(a) to 3(d). PC Boniface Kioko, PW13, arrested the accused with two others on 18th May 2015 and booked him at Obama Police Police and PC Kyalo Munyao, PW14, attended the post mortem of the deceased. CPL Richard Kipsang, PW15, took over the investigations of this case. He told the court that when he visited the scene he found the pub had been closed. He did not find the person who was operating it on 18th April 2015 when this offence was committed.

Dr. Kizzy Shako, PW16, examined the accused and certified him mentally fit to stand trial. Dr. Edwin Walong examined the body of the deceased on 29th July 2015. The doctor found contusion on frontal scalp without breakage of the scalp. He found no evidence of defence injuries on the upper limbs. Internally there was haematoma on the right side of the head. He found intracranial pressure on the brain. His opinion was that the deceased died due to head injury due to blunt force trauma.

I have analysed all the evidence to show that the evidence on the identity of the person who assaulted the deceased is weak. All the evidence shows is that one Opiyo was mentioned as the one who had assaulted the deceased but there is no witnesses who saw him do so. The evidence of James Kaliku is that he saw accused at the scene where a fighting was going on but he did not identify the people the accused was fighting with. This is weak evidence because this court cannot assume that the people the accused was alleged to be fighting with included the deceased. John Mwema told the court that he identified accused at Obama Police Post but Officer Kipngetich Murei denied conducting identification parade. The bar attendant, Catherine, who is mentioned in evidence did not testify nor did the owner of the Pub. The origin of the word going round that the accused assaulted the deceased is not known.

My careful analysis of this evidence shows that the police handled this case unprofessionally. The investigations have left many loose ends. The evidence tendered cannot stand the test and even if this court were to place the accused on his defence, shot of him admitting the offence, the evidence against him cannot sustain a conviction. It is my finding that there is no evidence that the accused has committed this offence. The prosecution and the defence counsels opted not to address this court after the prosecution closed its case. Basing my findings on the evidence placed before me and the law I hereby find that the evidence does not establish a prima facie case against the accused person on which this court could rely on to place him on his defence. In compliance to Section 306 (1) of the Criminal Procedure Code I hereby record a finding of not guilty and acquit Philip Mutua Makenzie for no case to answer. He is free to go home unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 11th May 2017.

S. N. Mutuku

Judge